



**Town of Arlington
Legal Department**

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To: Select Board

Cc: Town Committees and Commissions; Adam Chapdelaine, Town Manager; John Leone, Town Moderator

From: Douglas W. Heim, Town Counsel

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Re: Coronavirus and Attendance and Participation at Public Meetings & Town Meeting

I write to provide an overview of the Town's options for limiting large group gatherings in light of coronavirus concerns, the declared State of Emergency, and "social distancing" strategies to limit virus transmission in the contexts of both regular meetings Committees, Boards, and Commissions, and the upcoming Annual Town Meeting. In short, with respect to regular meetings of Town boards and commissions, the Town can cancel or postpone non-essential meetings, inform and invite the public to take precautions, encourage individual public body members to participate remotely if they have reasonable health concerns, and take measures to enhance options available to public viewing of meetings without being physically present at their discretion. The Town may not however close meetings to the public or engage remotely without a quorum of members physically present.

With respect to Town Meeting, the law does not afford options for remotely conducted representative town meetings and our own bylaws mandate a quorum of Town Meeting Members (25% of the Meeting) for most business and no less than 85 members present for any article or action that requires 2/3rds votes. The Town Moderator is however authorized by G.L. c. 39 sec. 10(a) to place Town Meeting into recess for up to thirty (30) day increments until a time and date certain if the Moderator determines that members would be unable to attend town meeting due to a “public safety emergency.” Hence, the Town Meeting could be delayed, but not cancelled in the interests of either preparing any necessary precautions and/or implementing social distancing until a State of Emergency has passed.

Regular Town Board and Committee Meetings

G.L. c. 30A sec. 18-25 (the “Open Meeting Law”) requires that all meetings of public bodies be “open to the public.” The Attorney General’s Office has consistently interpreted “open” to mean that public bodies must ensure that members of the public can be physically present at meetings and able to hear and see what is being discussed. *See* G.L. c. 30A, § 20(a); OML 2017-135; OML 2014-3;; OML 2015-38; OML 2013-189. Indeed the Division of Open Government has determined that video broadcasting alone is not sufficient to satisfy the law.¹ *See*, OML 2019-87.

Accordingly, the Town can take a variety of steps to seek cooperation from the public in minimizing large gatherings, but it may not conduct board, committee, or commission business without permitting members of the public to physically attend such meetings. Some suggestions include encouraging interested parties to submit written comments in lieu of in-person

¹Use of overflow rooms utilizing audio or A/V broadcasting may be implemented where the number of attendees cannot be reasonably accommodated.

comments; recording or broadcasting meetings that are not ordinarily televised or otherwise broadcast; and implementing other recommendations of public health professionals. However, it must be made abundantly clear that public attendance, and in the case of hearings, participation, is not prohibited.

Additionally, the Town has adopted so-called “Remote Participation” under G.L. c. 30A sec. 20(d), whereby individual members of a public body may participate in a meeting remotely if such remote participation meets certain criteria. Foremost, remote participation is permitted where “physical attendance would be unreasonably difficult.” 940 CMR. 29.10(5). It is the opinion of this Office that given the State of Emergency relative to the coronavirus, if a member of a public body has good faith reason to believe that participation would pose an undue risk to their health or the health of others, they would qualify for remote participation. However, remote participation still requires *all three* of the following:

- (a) Remote participants and all persons present at the meeting location must be clearly audible to each other;
- (b) A quorum of the body, including the chair or, in the chair's absence, the person authorized to chair the meeting, must be physically present at the meeting location; and
- (c) Remote participants must be able to vote, and shall be considered present for the Meeting.

910CMR 29.10(4).

Depending on the method of remote participation, further regulations apply (for example, use of video conferencing technology requires all persons present at the meeting be able to see the remote participant. 910 CMR 29.10(6)(b). Boards considering remote participation are

encouraged to view the Division of Open Government's training video on same:
<https://www.mass.gov/service-details/open-meeting-law-training-videos>

It should however be understood that given limitations on Town resources and partner entities such as ACMI, it may not be possible to provide sufficient remote participation or supplemental means of public access to a wide range of public bodies.

Town Meeting

While the Open Meeting Law does not generally apply to Town Meeting (G.L. c. 30A sec. 18(e)), particularly as a community with a representative Town Meeting, there is no legal provision for conducting Town Meeting remotely. In addition to the requirements of G.L. c. 39 sec. 10 (which include setting the "time and place of holding the meeting" via the Warrant and ensuring adequate measures for attendee participation), Title I, Article I, Section 6 of the Town Bylaws mandates a quorum of members be physically present for Town Meeting business, providing as follows:

Section 6. Quorum

(ART. 15, ATM – 05/09/94), (ART. 22, ATM – 05/11/11)

Twenty five percent of the total number of Town Meeting positions shall constitute a quorum for doing business at Town Meeting. No non procedural action or reconsideration requiring a two thirds vote under the provisions of any general or special law shall be taken without the affirmative vote of at least eighty five Town Meeting Members, provided that no standing vote shall be required to satisfy the requirements of this section if the Town Clerk certifies on the record that at least eighty five Town Meeting Members are present and voting. (Note: This Quorum By Law is allowed based on a Special Law, Chapter 428 of the Acts of 1984 and supersedes the Quorum requirements of Chapter 43A Section 5.)

(emphasis added).

It should be further emphasized that to this Office's understanding, even if some form of remote participation were allowed, our present voting technology (colloquially, our "clickers") do not have remote participation capabilities. Therefore, it does not appear at present that the Town has either legal or practical alternatives to holding a Town Meeting with at least 85 members, plus the Moderator and other necessary parties in attendance.

Following relatively recent weather events that impacted Town Meetings throughout the Commonwealth in 2014, Town Moderator are now empowered by G.L. c. 39 sec. 10A(to declare a recess of Town Meeting to a time, place and date certain of up to thirty (30) days without convening the meeting where the Moderator:

- 1) consults with public safety officials and the Select Board; and
- 2) determines that a weather-related or "public safety emergency" renders Town Meeting Members unable to attend a town meeting.

G.L. c. 39 sec. 10A(a) and (c). The Moderator does not need to appear at Town Hall to make such a declaration and any meeting for making such a determination is not required to be an open meeting under c. 30A. However, the Moderator must prepare a declaration of a recess setting forth the reason(s) for the recess, identifying the time, date and location of the resumed Town Meeting.

It is essential to understand the context of any such decisions about Annual Town Meeting in that the Town is required to complete its Annual Town Meeting and pass a budget at Town Meeting before June 30th each year. G.L. c. 39 sec. 9. Additionally, "expenditure of twenty thousand dollars or more as a special appropriation, or establishing a new board or office., or adopting a new by-law, or amending an existing by-law, shall not be operative until after the expiration of seven days, exclusive of Sundays and holidays, from the dissolution of the

meeting.” G.L. c. 43A sec. 10. Hence, functionally speaking, there may be some matters which mandate dissolution of Town Meeting seven (7) days (not inclusive of Sundays) before the beginning of the new fiscal year (Monday June 22, 2010).

It is possible that the Town Meeting could convene to substantively address only those articles which are essential to the continued operations of the Town, and opt for “no action” on all other matters until such a time as a Special Town Meeting could be convened to resume consideration of those subjects. For many articles, including consideration of Town Bylaw amendments and Home Rule Legislation, the most significant impact would be delay. However, it should also be understood that certain subjects of the 2020 Annual Town Meeting Warrant, including zoning measures carry significant procedural requirements for advertising hearings and holding hearings in advance of any Town Meeting consideration under c. 40A, as well as ramifications for votes of “no action.”

In conclusion, absent relief from the State from the requirements of c. 39, c. 43A, and other relevant reporting requirements, the Town has limited options to respond to concerns about Annual Town Meeting in a State of Emergency which encourages social distancing and discourages large public gatherings. The Moderator has the authority to delay Town Meeting if necessary, public health personnel can attempt strategies to mitigate risks, and Town Meeting Members can be encouraged to exercise good judgment to assist themselves and others in minimizing risks further. However, at present, at least 85 members of Town Meeting must convene in person to vote upon budgets and other essential articles with enough time to dissolve in advance of the start of the fiscal year.